

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Amendment of the Commission’s Rules ) MB Docket No. 10-71  
Related to Retransmission Consent )

**COMMENTS OF BLOCK COMMUNICATIONS, INC.**

Block Communications, Inc. (“BCI”) hereby files these comments in response to the FCC’s *Further Notice of Proposed Rulemaking* in the above-referenced proceeding concerning amendments to the FCC’s network non-duplication and syndicated exclusivity rules (the “Program Exclusivity Rules”).<sup>1</sup>

**I. INTRODUCTION**

BCI supports retention of the Program Exclusivity Rules, but urges the FCC to amend those rules to ensure that local TV viewers are able to receive the same line-up of stations that they can receive over-the-air. This result can easily be accomplished by (1) adopting the FCC “alternate” proposal to amend the network non-duplication rule to reflect the same Grade B contour exception that currently is employed in the syndicated exclusivity rule; and (2) prohibiting enforcement of network affiliation agreements to the extent that they prohibit a local station from granting retransmission consent to MVPDs serving areas within their over-the-air service contour.<sup>2</sup>

As the parent company of a small cable system serving Toledo, Ohio, and several full-power, Class A, and low-power television stations in small markets around the country, BCI has

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<sup>1</sup> See Amendment of the Commission’s Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (2014) (the “FNPRM”).

<sup>2</sup> See *id.* at 3395. BCI also agrees that the FCC should update its Program Exclusivity Rules to reflect that the relevant service contour for the purposes of these rules is the digital “noise limited service contour” rather than the former analog Grade B contour. See *id.* at n.271.

an exceptional vantage point to observe the functioning and effectiveness of the Program Exclusivity Rules.<sup>3</sup> In BCI's experience, these rules can play an important role in promoting localism by guaranteeing local TV stations' ability to acquire programming without having to worry that MVPDs will import duplicating programming from far-distant markets. Ensuring exclusive local distribution of network and syndicated programming is an important part of the economics of local broadcasting, and the revenues that flow from local exclusivity should go to funding the production of local news, weather, sports, and emergency programming that are the hallmark of the exceptional American broadcasting system.

At the same time, however, the Program Exclusivity Rules should never trump reasonable viewer expectations about what stations will be available from their local MVPDs. The FCC stated long ago that the guiding purpose underlying the Program Exclusivity Rules is to "reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have."<sup>4</sup> In other words, consumers expect they will be able to obtain MVPD service that replicates their over-the-air experience, and the FCC's rules should not act to defeat that expectation. As the American Cable Association correctly point out, local

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<sup>3</sup> BCI owns Buckeye Cablevision, Inc. ("Buckeye"), a small cable company that services approximately 130,000 subscribers in Northwest Ohio and Southeast Michigan. BCI's broadcast division owns Fox network affiliate WDRB(TV), Louisville, Kentucky; NBC network affiliates WLIO(TV), Lima, Ohio, and WAND-TV, Decatur, Illinois; and MyNetwork affiliates KTRV(TV), Nampa, Idaho, and WMYO(TV), Salem, Indiana. BCI also owns several Class A and low power stations through its affiliate West Central Ohio Broadcasting, Inc. These stations provide local network affiliate service to parts of rural Ohio.

<sup>4</sup> *Teleprompter of Quincy*, 83 FCC 2d 431 ¶14 (1980) (citing Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems, *Memorandum Opinion and Order*, 67 FCC 2d 1303, 1305 (1978); Application of American Television and Communications Corp., *Memorandum Opinion and Order*, 47 F.C.C.2d 211 (1974); In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television, *Report and Order*, 36 FCC 2d 143, 181 (1972); First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683, 720 (1965).

broadcasters have no reasonable expectation of exclusivity with respect to stations that cover their service area with a quality over-the-air signal.<sup>5</sup>

Today the network non-duplication rules have precisely the effect of undoing MVPD subscribers' rightful and reasonable expectation that MVPDs will offer the same channels they can receive over the air. A local broadcaster can use the FCC's rules to force an MVPD to black out duplicating network programming from an out-of-market station even when that station covers the MVPDs' service area with a high-quality over-the-air signal.<sup>6</sup> The rule for syndicated exclusivity is very different; local broadcasters cannot use the FCC rules to force MVPDs to black out duplicating syndicated programming from an out-of-market station if that station covers the MVPDs' service area with a "Grade B" quality signal.<sup>7</sup> This discrepancy creates a loophole that can be exploited by stations seeking network non-duplication protection against TV stations that should be their natural competitors.

Recognizing this problem," the FCC proposed to close the "Grade B loophole" in 1988 after readopting the syndicated exclusivity rules.<sup>8</sup> While the FCC never acted on that proposal, BCI has argued for years that Grade B loophole was harming consumers and should be closed.<sup>9</sup> The FCC should take this opportunity to protect consumers by establishing that the same

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<sup>5</sup> See *FNPRM*, 29 FCC Rcd at 3395-96 (citing Comments of American Cable Association, MB Docket No. 10-71, filed May 18, 2010, at 67-68 (the "ACA Comments")).

<sup>6</sup> See 47 C.F.R. §76.92.

<sup>7</sup> See 47 C.F.R. §76.106.

<sup>8</sup> Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, *Further Notice of Proposed Rulemaking*, 3 FCC Red 6171 (1988) (the "*Syndex Reistatement Notice*").

<sup>9</sup> See Comments of Block Communications, Inc., Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, filed May 27, 2011, at 11-12 (the "Block Comments"); Supplemental Comments of Block Communications, Inc., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, GEN Docket No. 87-24, filed July 8, 2010.

contour-based exception applies to both the syndicated exclusivity and network non-duplication rules.

Closing the Grade B loophole in the network non-duplication rule also is necessary to protect consumers from rising retransmission consent rates that do not reflect market realities. As noted above, network and syndicated exclusivity can be important to a station's ability to capture sufficient revenue to fund important local services. The FCC's rules, however, should not encourage local broadcasters to gain super-competitive rates by excluding their natural competitors – other TV stations that can be received over the air.<sup>10</sup> In an effort to increase retransmission consent fees, local broadcasters now routinely invoke exclusivity against stations from adjacent markets that are available over the air. This practice is buttressed by network affiliation agreements that prohibit local broadcasters from granting retransmission consent outside their assigned designated market areas (“DMAs”).<sup>11</sup> The Commission should take this opportunity to protect customers from rising retransmission consent rates by eliminating both of these practices.

Local broadcasters need some level of exclusivity for the American broadcasting system to continue serving viewers across the country. But fair is fair: the rules should be amended to eliminate the anti-competitive purposes to which the Grade B loophole has been put to use.

## **II. THE GRADE B LOOPHOLE IN THE NETWORK NON-DUPLICATION RULES IS AN ACCIDENT OF HISTORY AND SHOULD BE CLOSED.**

As noted in the *NPRM*, the exclusivity protections offered by the network non-duplication and syndicated exclusivity rules differ in one important respect: syndicated exclusivity cannot be asserted against out-of market stations within those stations' Grade B

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<sup>10</sup> See *FNPRM*, 29 FCC Rcd at 3395-96 (citing *ACA Comments* at 67-68).

<sup>11</sup> See *Block Comments* at 7-8.

service contours, while network non-duplication protections can be asserted against any out-of-market station regardless of its signal coverage.<sup>12</sup>

When the FCC readopted its syndicated exclusivity rules with the Grade B exception, it recognized that the discrepancy with the non-duplication rules should be corrected,<sup>13</sup> and it sought comment changes to the rules that would close the network non-duplication Grade B loophole.<sup>14</sup> Yet despite the FCC's professed intention to ensure that the "network non-duplication protection . . . conform as closely as possible to our other programming exclusivity provisions,"<sup>15</sup> the FCC never has acted on its stated intention to synchronize the discrepancy between the syndicated exclusivity and network non-duplication rules. This has left stations free to assert non-duplication protections against stations from different DMAs, even within those stations' over-the-air service contours.

The FCC should act now to eliminate this anomaly in the rules. The Program exclusivity Rules were never intended to provide stations with exclusivity rights against competing over-the-air television signals. Viewers should have their choice of signals available over-the-air, and that choice should not be constrained by the operation of the FCC's rules. As the American Cable Association has correctly noted, local TV stations "have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air" because the FCC designed the Program Exclusivity Rules solely to "prevent import[ation of] duplicative distant signals that are not available over-the-air in the community."<sup>16</sup> The Grade B loophole in

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<sup>12</sup> See *FNPRM*, 29 FCC Rcd at 3995-96; 47 C.F.R. §§ 76.156(a), 76.92(f).

<sup>13</sup> See *Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, 3 FCC Rcd 5299, 5315-19 (1988) ("*Syndex Reinstatement Order*").

<sup>14</sup> See *Network Non-Duplication Notice*, 3 FCC Rcd at 6174-76, 6177.

<sup>15</sup> See *Syndex Reinstatement Order*, 3 FCC Rcd at 5319.

<sup>16</sup> See *Comments of American Cable Association*, MB Docket No. 10-71, filed May 18, 2010, at 67-68.

the network non-duplication rule, however, gives local stations precisely the right to accomplish that.

Closing the Grade B loophole would better reflect viewers' rightful expectations of what services they can receive from an MVPD. Those expectations historically have been developed based on which stations are available over-the-air. The syndicated exclusivity rule reflects this bedrock value by exempting from its coverage stations that place a Grade B signal over the community where the station claiming exclusivity is located. The network non-duplication rule, however, contains no such exception and should be changed.

### **III. THE CURRENT RULES ARE BEING MANIPULATED TO ACHIEVE SUPER-COMPETITIVE RETRANSMISSION CONSENT RATES.**

The FCC last examined the Grade B loophole in the network non-duplication rule prior to Congress's enactment of the current must-carry and retransmission consent provisions of the 1992 Cable Act.<sup>17</sup> Three developments in the retransmission consent marketplace since 1992 have added a new urgency to eliminating the Grade B loophole. First, as Buckeye has pointed out, local stations' drive to maximize retransmission consent revenues has led them to become increasingly aggressive in asserting network non-duplication rights against stations in adjacent markets.<sup>18</sup> Second, national networks have steadily increased the amount of retransmission consent revenue that must be paid to the network as part of the compensation paid for network exclusivity.<sup>19</sup> And third, national networks increasingly prohibit stations from granting

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<sup>17</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>18</sup> See BCI Comments at 3-8.

<sup>19</sup> See *id.* at 9-11.

retransmission consent outside the station's DMA, regardless of the extent of the station's service.<sup>20</sup>

These developments harm viewers in at least two important ways. The elimination of competition among stations that once competed for over-the-air viewers leads to increased leverage in retransmission consent negotiations for the in-market network affiliate, leading to higher retransmission consent rates and, ultimately, higher consumer bills. Moreover, MVPD subscribers accustomed to having a choice among network affiliates they can receive over-the-air are increasingly deprived of that choice by local stations seeking to boost their profits. The result for consumers is less choice at a higher price. This wasn't the FCC's intent in adopting the network non-duplication rule and the Commission should close the Grade B loophole to address these unforeseen consequences of the rules.

Both subscribers to BCI's cable system and BCI's broadcast viewers have suffered as a result of the Grade B loophole. As discussed in its comments in this proceeding, BCI's ABC-affiliated WAND(TV) is unable to grant retransmission consent to MVPDs serving areas outside WAND(TV)'s market but within its Grade B contour due to the combination of the FCC's rules and the terms of its affiliation agreement.<sup>21</sup> As its former viewers lose access to WAND(TV)'s signal, its advertising revenues are bound to decrease. And WAND(TV) is effectively prohibited from maximizing its retransmission consent revenues in significant parts of its service area. The loss of revenue suffered by WAND(TV) has a negative impact on the service the station can provide to all of its over-the-air viewers. Again, MVPD subscribers in the affected areas get less choice, while all WAND(TV) viewers must accept service that is less than it would be if the FCC's network non-duplication rule were rationalized.

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<sup>20</sup> See *id.* at 7-8.

<sup>21</sup> See *id.*

In addition, Buckeye's Toledo cable subscribers have increasingly been deprived of television stations from the neighboring Detroit DMA, despite the fact that many Detroit DMA stations can be viewed in Toledo.<sup>22</sup> BCI currently is involved in a retransmission consent dispute regarding Toledo NBC affiliate WNWO(TV). WNWO(TV) has been off the air for more than six months, depriving Toledo viewers of NBC programming. Buckeye carries Detroit NBC affiliate WDIV(TV), but is required by the network non-duplication rule to black out NBC programming, despite the fact that Buckeye's subscribers cannot view NBC programming from any source. WDIV(TV)'s noise limited service contour covers much of Toledo and its suburbs, and Toledo viewers have long had over-the-air access to the station's programming. But operation of the FCC's rules ensures that viewers cannot have access to this programming over cable even though they can receive it over the air. Again, Buckeye's subscribers have less choice and Buckeye can only restore that choice by paying retransmission consent rates that are inflated by an exclusivity rule that the FCC never intended to function in this way.

As these examples illustrate, the Grade B loophole harms all TV viewers and hamstring many local broadcasters. The FCC should adopt the pro-consumer option in this matter and amend the network non-duplication rules to include a contour-based exception that corresponds to that included in the syndicated exclusivity rule.

**IV. THE FCC SHOULD ACT TO PROTECT CONSUMERS BY ADDING A CONTOUR-BASED EXCEPTION TO THE NETWORK NON-DUPLICATION RULES AND PROHIBITING ENFORCEMENT OF AGREEMENTS THAT RESTRICT STATION'S ABILITY TO GRANT RETRANSMISSION CONSENT OUTSIDE THEIR DMAs.**

While the FCC certainly should close the Grade B loophole, that won't be enough to restore viewers' choice and welfare to match their rightful expectations. The FCC also must act

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<sup>22</sup> See *id.* at 4-6.

to curtail affiliation agreements that restrict broadcasters' ability to grant retransmission consent within their service areas. Networks increasingly insist on contractual provisions that prohibit stations from granting retransmission consent outside their DMAs. These clauses work to defeat Congress's intent that stations be permitted to use retransmission consent revenues to bolster local service to all of their viewers. Such clauses also work to deprive viewers of choices that they otherwise would have.

BCI notes that it does not generally object to geographical restrictions in network affiliation agreements. The FCC has noted that networks have a right to control the geographic extent of the rights they grant, and BCI is not challenging that principle. Indeed, BCI submits that certain geographical limitations are part of the fabric of the local TV network/affiliate system. In the limited cases where network DMA restrictions prohibit a local affiliate from granting retransmission consent within their service area, however, such restrictions effectively prohibit local TV stations from serving the viewers they are required by their license to serve.<sup>23</sup> This is a nonsensical result that hurts TV viewers. The FCC must address this problem to ensure that local stations can provide the services that viewers rightly expect.

At a minimum, the FCC should amend the rules to extricate itself from enforcing network exclusivity clauses that interfere with TV stations fully serving their licensed service areas. The FCC can accomplish this by adopting an exception to the network non-duplication rule that guarantees local broadcasters the right to grant retransmission consent in any area within their service contour. The FCC also should consider declaring contractual clauses that prohibit

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<sup>23</sup> While the FCC relies on DMAs as a convenient proxy for a station's market in many contexts, the FCC also has repeatedly held that a station's service contour – not its DMA – provides the best approximation of its natural audience and economic market. *See, e.g., Market Modifications and the New York Area of Dominant Influence Petitions for Reconsideration and Applications for Review*, 12 FCC Rcd 12262, 12271 (1997) (absent other market facts, Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular station's signal").

stations from granting retransmission consent within their service contours contrary to FCC policy and prohibit local stations from entering into agreements that have such restrictions. The FCC has chosen to abrogate contractual exclusivity in similar cases, even when the party granting exclusivity is beyond the FCC's jurisdiction.<sup>24</sup> The FCC should take a similar approach here and take whatever steps are necessary to ensure that every local station can provide full service to all viewers in its service area.

## V. CONCLUSION

For the foregoing reasons, BCI request that the FCC amend its rules as described herein.

Respectfully submitted,

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<sup>24</sup> Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235, 20235-36 (2007) (banning contracts granting cable operators the exclusive right to serve individual multi-dwelling unit buildings despite the fact that the building-owners granting exclusivity are outside the FCC's jurisdiction).